Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1241

MARLENE WAGNER, MARY ELLEN NORTON, GERALDINE H. BRDAR, WILLA McGUIRE, and FRANCES B. BECTON,

Petitioners,

vs.

BURLINGTON NORTHERN INC., a corporation, and THE BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYEES, LODGE NO. 1047,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

The petitioner herein, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit, made and entered in the above entitled case on October 12, 1977. The petition for rehearing and en banc suggestion was denied on December 8, 1977.

OPINIONS BELOW

The opinion and judgment of the Court of Appeals (Appendix A hereto, infra, page 1a) is unpublished and unreported per circuit rule 35. The memorandum opinions of the District Court for the Northern District of Illinois for April 14, 1976 and November 15, 1976 are reported at *Wagner, et al. v. Burlington Northern, et al.*, 411 F. Supp. 537 (1976).

JURISDICTION

The judgment of the Court of Appeals for the Seventh Circuit was entered on October 12, 1977 (Appendix A, infra, page 8a). A timely petition for rehearing and en banc suggestion was denied on December 8, 1977 (Appendix B, infra, page 9a). The jurisdiction of this Court is invoked under Title 28 U.S.C. 1254(1), Supreme Court Rules of Practice, part 5, 19 para., 1(b).

QUESTIONS PRESENTED

1. Whether the Court of Appeals, under the circumstances of this case, can affirm the judgment of the District Court when both courts have improperly weighed the facts of the case, and the evidence that the Plaintiffs-Petitioners presented both to the Court of Appeals and the District Court.

2. Whether the Court of Appeals can ignore the Supreme Court's intent when *Hines v. Anchor Motor Freight*, 424 U.S. 554 (1976) was decided.

3. Whether the disputed questions of facts between the Plaintiffs-Petitioners and the Defendants-Respondents were wrongly interpreted by the District Court which erred reversibly in issuing a Summary Judgment and by the Appellate Court which committed a reversible error when it affirmed the lower court's order regarding questions which can only be equitably answered at trial.

4. Whether the Court of Appeals and the District Court can properly be in conflict with the power and the provisions of the Constitution of the United States to empower Congress "to make all laws . . ." (Art. 1, Sections 1 and 8).

5. Whether the Court of Appeals and the District Court can misinterpret the authority of the *Interstate Commerce Act* (24 Stat. 379, 383; 49 U.S.C. 1-22), and the authority of the *National Labor Relations Act of 1935* (29 U.S.C. 157, 158, 159).

6. Whether the Court of Appeals and the District Court can deny the authority of the Interstate Commerce Commission to regulate "in the public interest" combinations and consolidations of carriers subject to the *Interstate Commerce Act* (49 U.S.C. 5).

7. Whether the Court of Appeals can give proper credence to the validity and terms of Union and Management Agreement, and the necessity that all parties abide by the terms of such agreement.

STATUTES INVOLVED

1. The Constitution of the United States, Article 1, Sec. 1 and Article 8, 5th and 14th Amendments.
2. The National Labor Relations Act, 29 U.S.C. 157, 158(a), and 159(a).
3. The Interstate Commerce Act, 49 U.S.C. 5.

STATEMENT OF CASE

The Plaintiffs-Petitioners in this matter were clerical employees of the Chicago, Burlington & Quincy Railroad Company in March of 1970, when the aforesaid carrier merged with four other carriers, which resulted in the creation of the Burlington Northern Railroad under the Charter of the Great Northern and Burlington Lines, Inc., a Delaware Corporation, hereinafter referred to as the respondent BN, and were members of the Brotherhood of Railway and Airline Clerks, hereinafter referred to as the respondent BRAC.

Prior to the Interstate Commerce Commission's (hereinafter referred to as the Commission) approval of the merger, the several carriers who were trying to effect the merger had met with some 20 months of opposition from the Commission. The Commission had strongly opposed and vetoed any effort of the carriers involved to merge due to the number of adversely affected employees. In an effort to have the Commission reverse its position, the several carriers which were to comprise the respondent BN effected an agreement with the respondent BRAC called the Merger Protection Agreement, dated November 17, 1967 (hereinafter referred to as the Agreement). The stated purpose before the Commission was said to be the protection of the employees and jobs affected by the merger. Article XII of this Agreement provided for a Special Board of Adjustment (hereinafter called the Board). The very first effort of this Board at its preliminary hearings at the Dupont Plaza Hotel, Miami, Florida, on November 28, 29 and 30, 1967, was to article by article review the entire Agreement.

The Plaintiffs-Petitioners were denied the benefits and the protection of the Agreement. Count I—Plaintiffs-Petitioners were not used in comparable jobs as contemplated by the Agreement, and certain plaintiffs were not afforded the opportunity to participate in the respondent BN's lump sum separation allowance program. Count II—Plaintiffs-Petitioners individually protested the respondent BN's contractual violations to the respondent BRAC, but the respondent BRAC, in the person of the Local Chairman, did not heed these protests and the respondent BRAC refused to process grievances on their behalf in violation of its duty of fair representation.

Despite credible affidavits presented by both sides, the District Court granted the respondent's motions for Summary Judgment as to eight of the original 11 plaintiffs. On April 14, 1976 the court permitted three of the plaintiffs to file an amended complaint. On November 15, 1976, the District Court granted the respondents' motions for Summary Judgment as to the remaining plaintiffs.

The Plaintiffs-Petitioners having been denied due process and equitable relief, appealed the lower court's judgment to the United States Court of Appeals for the Seventh Circuit. The trial court's judgment was affirmed on October 12, 1977. The Plaintiffs-Petitioners continued in their efforts to seek equitable relief and filed a petition for rehearing with the Appellate Court which was denied on December 8, 1977.

REASONS FOR GRANTING THE WRIT

I.

The District Court and the Appellate Court incorrectly resolved the issues presented in this matter. Summary Judgment is inappropriate where there exists a genuine issue as to any material fact. In this matter, both parties submitted conflicting affidavits, and the District Court violated a well settled point when it erroneously conducted a trial by affidavit. See *Sartor v. Arkansas Natural Gas Corporation*, 321 U.S. 620 (1944). In so doing, the District Court completely ignored the plaintiffs' exhibits which included copies of the grievances that they had tried in vain to submit to their Local Union Chairman, who refused them in direct violation of the standards embodied in both the *Vaca v. Sipes*, 386 U.S. 171, and *Hines v. Anchor Motor Freight*, 424 U.S. 554 cases. In affirming the trial court's Summary Judgment, the Appellate Court further erred in not applying their own standards as developed in *Zahora v. Harnischfeger*, 404 F. 2nd 172 (7th Cir. 1972) that indicates that Summary Judgment was improper in the matter now before the court.

The reversible error committed by the Appellate Court is clearly shown by this Court's decision in *United States v. Diebold*, 369 U.S. 654 (1962), in that there was and is doubt as to material to the central issues of the case. The District Court's decision reflects a choice of inferences, incorrectly weighing the plaintiffs' exhibits entirely in violation of this court's standards as stated in *United States v. Diebold*, at 369 U.S. 655, which states:

> "On summary judgment the inferences to be drawn from the underlying facts contained in such

materials *must* be viewed in the light most favorable to the party opposing the motion. A study of the record in this light leads us to believe that inferences contrary to those drawn by the trial court might be permissible." (Emphasis added)

Clearly, in light of all of the above applicable standards the Plaintiffs-Petitioners were denied due process as guaranteed by the 5th and 14th Amendments of the Constitution of the United States when the District Court did in fact conduct a trial by affidavit.

II.

The District Court and Appellate Court in this matter have further denied the Plaintiffs-Petitioners their rights under a lawfully existing Union-Management Agreement. The Agreement sets forth specific rights of the Plaintiffs-Petitioners. This Court has in several instances set precedents by openly acknowledging that union-management agreements are not ordinary contracts, but generalized codes that govern a myriad of cases which cannot be wholly anticipated, and often to correctly interpret such agreements, the courts must look to related agreements, as well as practice, usage and custom. See *Transportation-Communications Employes Union v. Union Pacific Railway Company*, 385 U.S. 1032 (1966). There is no limit or rule that should prevent any court from following this court's example when confronted by such matters as involved in this instant case. In the *Chicago & North Western Railway Company v. United Transportation Union*, 402 U.S. 570, this Court, when confronted by vague or unclear statutory language made every effort to determine the true and correct meanings implied in order to secure equitable solution to the matters before it, looked not

only to the Acts involved, but to the very debate that took place on the Railway Labor Act, carefully examining the House hearings, which were quoted at length. The District Court and the Appellate Court chose not to follow this principle embodied in the court's example, but chose rather not to give credence to the plaintiffs' grievances, but to incorrectly weigh the doubt or questions that appear in the Agreement. Both Courts specifically did not apply the principles involved and used by this Court in *Chicago & North Western Railway Company v. United Transportation Union*, 402 U.S. 570. Both respondents as indicated in the Statement Of Case above, entered into an Agreement and further participated in hearings to resolve any doubts regarding the terms of the Agreement. The Plaintiffs-Petitioners expecting equitable relief before the courts, included a copy of these hearings, commonly known as the "Florida Agreement". Neither of the lower Courts apparently gave the Petitioners' exhibits the proper weight and credence, and now only this Court can act to insure the Petitioners equitable relief on these grave and important issues.

III.

In denying the Plaintiffs-Petitioners equitable relief and due process, both the Appellate and the trial Courts have ultimately misinterpreted the Power of the Constitution to create the Congress (Const. Art. 1) which has the Power to enact all legislation (Const. Art. 8) when it enacted the National Labor Relations Act (29 U.S.C.), and the Interstate Commerce Act (49 U.S.C.), which gives the Interstate Commerce Commission authority over "Combinations and Consolidations" of carriers (49 U.S.C. 5(2)). The Agreement grew out of the Com-

mission's veto power and opposition to the proposed merger, due to the large numbers of persons whose terms and conditions of employment would be unilaterally endangered. The actions of the Appellate and District Courts have, in effect, supplanted the terms of the Agreement, irreparably and permanently damaging the position of the Plaintiffs-Petitioners, supplanting the validity of the Union-Management Agreement, ultimately in direct conflict with the basic welfare and interests of the nation.

It is inescapable that the public interest of the nation requires the settlement by this Court of the grave questions involved. The action of the lower courts have imposed, for an indefinite period of time, inequitable changes in the employee-employer relationship which can conceivably result in millions of dollars in damages to all railroad employees, and ultimately affect the economy of the nation. Throughout the proceedings, the petitioners have sought not only monetary, but injunctive relief to prevent the respondents BN and BRAC from taking further irreparable and irrevocable actions which have already inflicted damages upon the Plaintiffs-Petitioners individually and ultimately upon all the respondent BN's employees.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

ARGUED SEPTEMBER 28, 1977—DECIDED OCTOBER 12, 1977.

BEFORE

Hon. WALTER J. CUMMINGS, *Circuit Judge*
Hon. ROBERT A. SPRECHER, *Circuit Judge*
Hon. HARLINGTON WOOD, JR., *Circuit Judge*

No. 77-1061

MARLENE WAGNER, JUDITH D. HILL, MARY ELLEN NORTON, GERALDINE H. BRDAR, IRMA JONES, WILLA MCGUIRE, FRANCES B. BECTON, BETTYE STUBBLEFIELD and REGINA BROWN,

Plaintiffs-Appellants,

v.

BURLINGTON NORTHERN INC., a corporation, and THE BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYEES, LODGE NO. 1047,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 75 C 683—**John F. Grady**, *Judge.*

ORDER

This appeal involves the interpretation of an employee protection agreement resulting from the merger of five railroads into the Burlington Northern, to determine whether Burlington Northern breached the agreement or a railroad brotherhood breached its statutory duty of fair representation of its members.

I

On November 30, 1967, the Interstate Commerce Commission approved the merger of the Great Northern Railway Company and the Northern Pacific Railway Company and three of their subsidiaries—the Pacific Coast Railroad Company; the Chicago, Burlington & Quincy Railroad Company (Burlington); and the Spokane, Portland & Seattle Railway Company—into what is now the Burlington Northern Inc. (the Company). 331 I.C.C. 228 (1967). A three-judge federal District Court for the District of Columbia affirmed the orders of the Commission in 296 F. Supp. 853 (1968). The judgment of the district court was affirmed by the Supreme Court of the United States in *United States v. Interstate Commerce Commission* (*Northern Lines Merger Cases*), 396 U.S. 491 (1970). The merger was consummated on March 3, 1970.

Section 5(2)(f) of the Interstate Commerce Act provides that the Commission "shall require a fair and equitable arrangement to protect the interests of the railroad employees affected," including a requirement that, for at least the length of his or her prior service up to four years, the merger shall not result in any employee "being in a worse position with respect to" his or her employment. 49 U.S.C. § 5(2)(f). On November 17, 1967, the five merging railroads entered into an employee protection agreement with the Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employees (the Brotherhood). The protection agreement provided that all employees of the five merging railroads "who have an

employment relationship on the date of the consummation of the merger . . . shall be taken into employment by the New Company . . . and shall be continued in compensated service with the New Company . . . until such time as they leave the service of the New Company by natural attrition" (Art. I, Sec. 1(a)).

The employee protection agreement further provided that "[p]rotected [e]mployees who held a regular assignment prior to the date of consummation of the merger shall be guaranteed by the New Company a minimum daily wage equivalent to the daily rate of the last position to which regularly assigned prior to the date of consummation of the merger" (Art. III, Sec. 1(a)). The Supreme Court noted, as the Interstate Commerce Commission had earlier noted, "that agreements entered into by . . . [the merging railroads] and their employees had removed objections of various unions to the merger and that no jobs would be eliminated except in the normal course of attrition." 396 U.S. at 505.

Thus the Company guaranteed the employees more than four years of equivalent employment but in fact a working lifetime of equivalent employment. The employee protection plan was approved by the Commission, by the three-judge court and by the Supreme Court with no objections by the affected unions. Therefore, the terms of the employee protection agreement are final and binding upon the employees involved in the merger.

This action was brought by eleven employees of the pre-merger Burlington against their present employer and the Brotherhood, seeking declaratory and injunctive relief and damages, for alleged breaches of the employee protection plan by the Company and for alleged breach of the statutory duty of fair representation by the Brotherhood. *Steele v. Louisville & Nashville Railroad*, 323 U.S. 192, 202-03 (1944). Nine of the plaintiffs were transferred to different seniority districts than those in which they had previously worked. Two of those plaintiffs did not appeal. Of the seven appealing plaintiffs complaining about transfers, three also complained of

the Company's failure to offer a separation allowance if they chose to resign their positions. The remaining two appealing plaintiffs complained that the Company required them to hold a different type of position involving working conditions which they deemed undesirable. All of the plaintiffs alleged that the Company forced them into a "worse position" with respect to their employment in violation of Section 5(2)(f) of the Interstate Commerce Act.

The district court granted summary judgment in favor of the defendants on April 14, 1976 as to all claims except the separation pay claims of the three plaintiffs. *Wagner v. Burlington Northern, Inc.*, 411 F. Supp. 537 (N.D. Ill. 1976). The court permitted the three plaintiffs to file an amended complaint, which they proceeded to do. The court then granted summary judgment on November 15, 1976 as to the remaining separation pay issue. Nine plaintiffs appealed the two final judgments.

II

In cases such as this where the employees bring an action against their employer for breach of contract and against their union for not fairly representing them in that breach-of-contract claim, "[t]he problem then is to determine under what circumstances the individual employee may obtain judicial review of his breach-of-contract claim despite his failure to secure relief through the contractual remedial procedures." *Vaca v. Sipes*, 386 U.S. 171, 185 (1967).

"A breach of the statutory duty of fair representation occurs only when a union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith." 386 U.S. at 190. "[W]here the union actually utilizes the grievance and arbitration procedures on behalf of the employee, the focus is no longer on the reasons for the union's failure to act but on whether, contrary to the arbitrator's decision, the employer breached the contract and whether there is substantial reason to believe that a union breach of duty

contributed to the erroneous outcome of the contractual proceedings." *Hines v. Anchor Motor Freight*, 424 U.S. 554, 568 (1976). The *Hines* case also added "dishonesty" to the catalogue of ways in which a union could expose itself to liability. 424 U.S. at 570, 571. In other words the employees' success in the judicial process depends first, upon a breach of contract by the employer, second, upon an attempt by the employees to exhaust their contractual remedies, and third, upon arbitrary, discriminatory, bad faith or dishonest representation by the union.

In the present case factual differences existed between the parties as to whether the plaintiffs had exhausted their contractual remedies but the district court concluded that "since we believe the union has acted properly regarding the grievances that have been adequately alleged, we can assume for purposes of these motions [for summary judgment] that plaintiffs have exhausted their remedies within the union" and within the employer protection agreement. 411 F. Supp. at 540. Article XII of the agreement established a Special Board of Adjustment in accordance with Section 3, Second, of the Railway Labor Act to "hear and decide any dispute between the parties hereto involving the interpretation or application of any of the terms of this Agreement. . . ."

III

The pleadings and affidavits before the district court demonstrated that there was no genuine issue as to any material fact and that the defendants were entitled to a judgment as a matter of law. Rule 56, Fed. R. Civ. P.

In regard to the broad claim by all the plaintiffs that the merger placed them in a "worse position with respect to their employment," the district court pointed out that "[n]owhere do plaintiffs allege that the merger resulted in a decrease in their compensation." 411 F. Supp. at 541. The plaintiffs did not controvert the Brotherhood's affidavits that they received or at least

were entitled to receive by filing designated forms their protected wage rate. Brotherhood officials characterized the employee protection plan which "guaranteed [the Burlington employees] lifetime employment at their protected wage rate—provided that certain procedural formalities were met . . . [as] the finest agreement of its type in the railroad industry."

In *Brotherhood of Maintenance of Way Employees v. United States*, 366 U.S. 169 (1961), the Supreme Court held that Section 5(2)(f) is satisfied by a requirement that employees receive compensation protection. The Court said at 176, 177 and 179:

> [In regard to legislative history] the statements the House conferees gave in explanation of the final version clearly reveal an understanding that compensation, not "job freeze," was contemplated.
>
> * * * *
>
> The indications gleaned from the history of the statute are reinforced and confirmed by subsequent events. Immediately after the section was passed, interested parties—including the brotherhood appealing in this case—expressed the opinion that compensation protection for discharged employees was the intendment of § 5(2)(f). The Commission echoed this interpretation in its next annual report, I.C.C. 55th Ann. Rep. 60-61, and began imposing compensatory conditions, and only compensatory conditions, in proceedings involving § 5 transactions. See *e.g., Cleveland & Pittsburgh R. Co. Purchase*, 244 I.C.C. 793 (1941). The Commission has consistently followed this practice to date in over 80 cases, with the full support of the intervening brotherhoods and the RLEA [Railway Labor Executives Association]; indeed, in one case where a variant of the present dispute arose, the RLEA argued at length that § 5(2)(f) did *not* impose a mandatory job freeze requirement—compensatory conditions would be satisfactory.
>
> * * * *

> In short, we are unwilling to overturn a long-standing administrative interpretation of a statute, acquiesced in by all interested parties for 20 years, when all the signposts of congressional intent, to the extent they are ascertainable, indicate that the administrative interpretation is correct.

We adopt the district court's rationale for the disposition of the claims relating to transfer of seniority districts and different type of position (411 F. Supp. at 541):

> Following the merger, Carrier required the Class I plaintiffs to assume a position in a different seniority district than the one in which they had worked prior to the merger. Plaintiffs were required to move from the Chicago General Offices to offices in Cicero, Illinois. Plaintiffs allege that this violates Article V, Sections 1(d) and 1(e) of the Merger Protection Agreement.
>
> A closer reading of the Agreement reveals that an employee can be moved to a different seniority district as long as the new district was in the home zone of that employee. See Article V, Section 1(d). Since, according to Article IV, the home zone of an employee spans a 30-mile radius, plaintiffs have not been moved outside their home zone. Cicero is in the same home zone as Chicago. Moreover, Attachment 2 to the Agreement explicitly states that Chicago and Cicero are in the same home zone. As to the alleged violation of Article V, Section 1(e), since that section deals with transfers outside the home zone, within the same seniority district, no claim is established here by plaintiffs.
>
> Therefore, on the basis of the merits of this grievance, it does not appear that BRAC's treatment of the grievance was arbitrary, discriminatory or in bad faith.
>
> Next, we consider the claim of the Class II plaintiffs that their move from clerical duties to janitorial duties violated Article V, Section 1(e).

> These plaintiffs make no allegations that these transfers would come within the terms of that section. The uncontroverted affidavit of Robert Curran states that the transfers were within the same home zone and seniority district. Therefore, on this basis, we believe Class II plaintiffs' grievances were meritless and as such required no action by BRAC. In this matter, BRAC has not breached its duty of fair representation.

The final claims related to the question of separation pay or allowance. The grievances of these three plaintiffs were taken to a Special Board of Adjustment as provided in Article XII of the employee protection agreement, which Board found, on August 29, 1975, that the plaintiffs "have not sustained the burden of proving entitlement to separation allowances under the provisions of Article XI" of the employee protection agreement on the ground that "the provisions of Article XI are permissive on the part of the Carrier" and "Protected Employees cannot demand a separation allowance unilaterally."

Both Section 3, Second, of the Railway Labor Act, 45 U.S.C. § 153, second, and Article XII, Section 1(k) of the agreement provide that Special Board awards "shall be final and binding upon both [all] parties to the dispute." To the extent such awards are judicially reviewable, they can be set aside "only for failure to comply with the requirements of the Act, lack of jurisdiction, or fraud or corruption." *United Transportation Union v. Indiana Harbor Belt Railroad Co.*, 540 F.2d 861, 862 (7th Cir. 1976).

The district court held that the Special Board addressed plaintiffs' grievance and therefore "we cannot entertain a suit on the merits of that grievance." The court also found that "the Board complied with the Railway Labor Act, that the Board had jurisdiction and that neither fraud nor corruption was present."

For these reasons the judgments of April 14, 1976 and November 15, 1976 are affirmed.

AFFIRMED.

APPENDIX B

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

December 8, 1977

BEFORE

Hon. WALTER J. CUMMINGS, *Circuit Judge*
Hon. ROBERT A. SPRECHER, *Circuit Judge*
Hon. HARLINGTON WOOD, JR., *Circuit Judge*

No. 77-1061

MARLENE WAGNER, JUDITH D. HILL, MARY ELLEN NORTON, GERALDINE H. BRDAR, IRMA JONES, WILLA McGUIRE, FRANCES B. BECTON, BETTYE STUBBLEFIELD and REGINA BROWN,

Plaintiffs-Appellants,

v.

BURLINGTON NORTHERN INC., a corporation and the BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYEES, LODGE NO. 1047,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 75 C 683—**John F. Grady**, *Judge.*

On consideration of the petition for rehearing and suggestion for rehearing *in banc* filed in the above-entitled cause by plaintiffs-appellants, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.